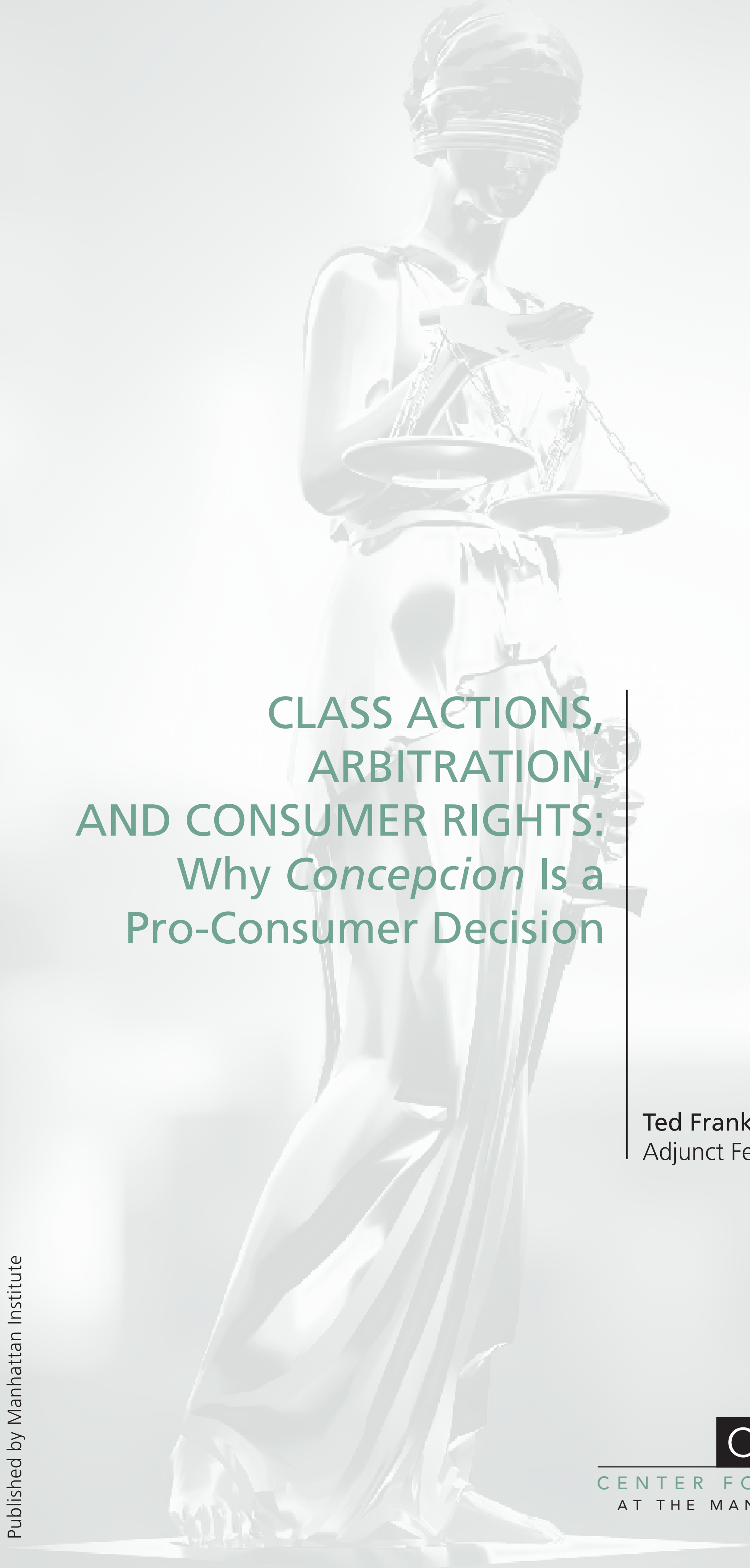
LEGAL POLICY REPORT

No. 16 February 2013



CLASS ACTIONS, ARBITRATION, AND CONSUMER RIGHTS: Why *Concepcion* Is a Pro-Consumer Decision

Ted Frank
Adjunct Fellow, Manhattan Institute

CLP
CENTER FOR LEGAL POLICY
AT THE MANHATTAN INSTITUTE

Published by Manhattan Institute

On February 27, 2013, the Supreme Court will hold oral arguments in *American Express Co.* v. *Italian Colors Restaurant*. Like the Court's 2011 decision in *AT&T Mobility* v. *Concepcion*, *Italian Colors* involves the intersection of two mechanisms for resolving legal disputes not easily handled by high-cost individually filed lawsuits: arbitration and class action litigation.

In class action litigation, similarly situated legal claims are aggregated under a single lawsuit. Given the cost of litigation, class action suits can be efficient mechanisms for resolving large numbers of relatively low-dollar claims, but they also can enrich lawyers at legitimate claimants' expense because such lawsuits' low value to individual plaintiffs reduces the incentive for any plaintiff to monitor the lawyers handling the claim.

Arbitration, a form of dispute resolution outside the courts, involves imposing as legally binding and enforceable the decision of a third party, typically specified in advance in contracts. Arbitration is generally favored and enforceable under federal law, through the 1925 Federal Arbitration Act (FAA). Potential corporate defendants have sought to use mandatory arbitration clauses to avoid the expense of class actions. The trial bar and allies in the legal academy criticized such clauses as "anticonsumer" and, for years, had success, particularly in California state court, in obtaining judicial rulings finding the clauses unenforceable, notwithstanding the language of the FAA.

Concepcion

Concepcion concerned AT&T's cell phone contracts, which included a mandatory arbitration clause that prohibited customers from bringing class action lawsuits against the carrier. Applying California law, the Ninth Circuit ruled that these clauses were "unconscionable" and thus unenforceable under state law—even though the court acknowledged that the arbitration clauses provided an adequate remedy to individual consumers. The Supreme Court reversed, determining that California's unconscionability rule as applied to AT&T's contract conflicted with the FAA, which preempted the conflicting state law. In reaching its holding, the Court determined that the California rule frustrated the FAA's objective of making arbitration agreements enforceable in national commerce and that AT&T's mandatory arbitration clause was "fundamentally fair" under the FAA.

Italian Colors

Italian Colors concerns an arbitration provision in the card-acceptance agreement that American Express enters into with retail businesses that agree to offer customers the option of using the company's charge or credit cards. The *Italian Colors* plaintiffs allege that AmEx's requirement that vendors accept both its charge and credit cards to do business with the company is a "tying arrangement" in violation of federal antitrust law. In February 2012, the Second Circuit held that the arbitration provision in AmEx's card-acceptance agreement was unenforceable against plaintiffs' claim, given that the high costs associated with pursuing an antitrust claim would preclude the "effective vindication of rights" absent a classwide treatment. On November 9, the Supreme Court granted *certiorari*.

Some commentators have argued that the Court's decision in *Concepcion* is likely to erode consumer rights—or even lead to the death of all class action lawsuits against businesses. These critics claim that mandatory arbitration agreements bar consumers from enjoying protections that only class actions can guarantee. These concerns are overwrought.

I. **As a general matter, consumers are likely to benefit from the ability to opt for individual arbitration in lieu of class actions.**

Class action lawsuits are a means of consumer protection—not the ends.

A. Class actions suffer from several structural deficiencies that can prevent class members from having their rights vindicated. Class actions often take years to reach a settlement, and even when they do, the parties have the incentive to structure settlement terms to make it difficult for class members to obtain substantive relief. Moreover, the large expense of class action defense means that, in the absence of procedural protections against self-dealing settlements, trial lawyers have the incentive to bring class actions of low merit. Thus, the deterrent effect of class actions is small because the innocent are treated by the judicial system little better than the guilty.

B. Compared with class actions, individual arbitration is notably efficient and effective at protecting consumer rights. Instead of taking years, the average consumer arbitration lasts just short of seven months. Also, despite claims to the contrary, consumers achieve equal or greater recoveries in arbitration compared with class actions. Consumers, unsurprisingly, prefer arbitration over litigation.

C. Companies' savings from arbitration are passed on to the consumer in the form of lower prices. Although consumers who prefer committing to mandatory arbitration to avoid paying higher prices can do so under *Concepcion*; those who do not are effectively protected by market mechanisms. Companies have an incentive to offer effective complaint-resolution processes to foster brand image and loyalty, which result in increased demand for goods and services.

II. **Though the Second Circuit's decision in *Italian Colors* is incorrect and should be reversed, class action lawsuits against businesses will not cease in the wake of *Concepcion* or a reversal in *Italian Colors*.**

In particular, class actions will continue largely unabated in the areas of contractual employment disputes and securities litigation. Many consumer class actions can be expected to continue as well, given the significant transaction costs that companies face in developing arbitration clauses that are enforceable under *Concepcion*.

Overall, the Supreme Court's decision in *Concepcion* has not led, and should not be expected to lead, to a broad erosion of consumer rights, as some alarmists have predicted. Unless the Court broadens its *Concepcion* holding in *Italian Colors*, beyond what the petitioners have asked for, many forms of class action lawsuits will continue, and those that are replaced by individual arbitration will generally lead to greater consumer protection, not less. *Concepcion* is appropriately viewed as an endorsement of a consumer's right to choose, not as a death knell for class action lawsuits and consumer rights.

About the Author

TED FRANK is an adjunct fellow with the Manhattan Institute's Center for Legal Policy and editor of the Institute's award-winning web magazine, PointofLaw.com. *The Wall Street Journal* has called him a "leading tort-reform advocate." Frank is also the president of the Center for Class Action Fairness, which he founded in 2009. He has written for law reviews, *The Wall Street Journal*, the *Washington Post*, and *The American Spectator*, and has testified about legal issues before Congress. He serves on the executive committee of the Federalist Society Litigation Practice Group. In 2008, Frank was elected to membership in the American Law Institute. Previously, Frank clerked for Frank H. Easterbrook on the United States Court of Appeals for the Seventh Circuit, was a litigator in private practice for 10 years, served as the first director of the AEI Legal Center for the Public Interest, and was an attorney for the McCain-Palin 2008 presidential campaign. Frank graduated from the University of Chicago Law School with high honors and as a member of the Order of the Coif and the Law Review.

CONTENTS

Class Actions, Arbitration, and Consumer Rights: Why *Concepcion* Is a Pro-Consumer Decision

Ted Frank

I. INTRODUCTION

On February 27, 2013, the Supreme Court will hold oral arguments in *American Express Co.* v. *Italian Colors Restaurant*,[1] an appeal from a decision by the U.S. Court of Appeals for the Second Circuit that invalidated a mandatory arbitration provision under federal law. *Italian Colors* follows on the heels of the 2011 5–4 Supreme Court decision in *AT&T Mobility LLC* v. *Concepcion*[2] striking down the Ninth Circuit's use of California state law to invalidate a mandatory arbitration provision. The *Concepcion* decision has generated a lot of hand-wringing in certain circles, with numerous scholars and activists complaining that the Court's ruling would result in untold harm to consumers and even in the "death" of the class action itself; these complaints are usually matched with calls for congressional legislation.[3] While a full assessment of the Supreme Court's class action jurisprudence should await its decision in *Italian Colors*, the scholars' and activists' complaints about *Concepcion* are generally overstated. Competitive market pressures generally ensure that consumers are unambiguously better off by being given the option to pre-commit to mandatory arbitration. And if the Court in *Italian Colors* adheres to the general principles it embraced in *Concepcion*, there will still be plenty of class actions, and perhaps too many at the margin.

I. BACKGROUND

Arbitration and class actions

Arbitration and class action litigation are each mechanisms for resolving legal disputes not easily handled by high-cost individually filed lawsuits. Arbitration, a form of dispute resolution outside the courts, involves imposing as legally binding and enforceable the decision of a third party, under rules and procedures agreed to in advance by the contracting parties. Arbitration is generally favored and enforceable under federal law, through the 1925 Federal Arbitration Act (FAA).[4]

In class action litigation, plaintiffs are permitted to aggregate similarly situated legal claims under a single lawsuit. Class action lawsuits for monetary damages trace to the 1938 adoption of the Federal Rules of Civil Procedure,[5] though the modern practice of adding plaintiffs to the class unless they affirmatively opt out of the litigation originated in 1966 amendments to those rules.[6] Arbitration agreements can, but need not, include class action–type mechanisms for aggregating multiple common claims.[7]

In recent years, the Supreme Court has issued two major decisions clarifying the extent to which arbitration agreements can preclude class action remedies. In its 2010 decision in *Stolt-Nielsen* v. *Animal Feeds International*,[8] the Court held that under the FAA, arbitrators cannot force classwide arbitration upon parties that did not agree to these procedures in the arbitration provisions of their contracts. In the following year, in *Concepcion*, the Court held that California courts' determination that state law rendered arbitration agreements that precluded class action remedies unenforceable was preempted by the FAA.

The Trial Bar's Anti-Arbitration Campaign

The Supreme Court's decisions follow in the wake of an anti-arbitration campaign by the plaintiffs' bar involving public relations and litigation and seeking legislation and regulation.[9] Arbitration clauses present a challenge to the business model of the class action plaintiffs' bar because when consumers are given a choice between contracting for a lower-priced product or service with a mandatory arbitration clause and paying a higher price to avoid a pre-commitment to arbitration, they almost invariably choose the benefits of mandatory arbitration.[10] Because the streamlined arbitration process is cheaper than litigation and presents less dramatic outliers in rulings, businesses have a strong incentive to adopt arbitration clauses. (Indeed, ironically, trial lawyers—including Concepcion's own attorney—regularly use mandatory arbitration clauses in their own retainer agreements, with no consumer group complaining about the practice.)[11]

Notwithstanding the Supreme Court's holdings in *Stolt-Nielsen* and *Concepcion*, the trial bar's anti-arbitration campaign has met with partial success. A one-sided and misleading Public Citizen report criticizing arbitration[12] was adopted wholesale by many media outlets.[13] Though the most far-reaching federal legislative efforts to undo the FAA failed, a bill passed that eliminated arbitration in the context of military personnel.[14] Moreover, the Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), and expressly tasked it with regulating the use of mandatory arbitration clauses in financial contracts; given the over-paternalistic instincts of the lawyers in charge of the agency,[15] it will be little surprise if the regulators running the organization choose to ban such clauses in their bailiwick.

The Path to **Concepcion**

On the litigation side, the trial bar found success in California, where state courts used "unconscionability" doctrine to strike down mandatory arbitration clauses.[16] Businesses that used mandatory arbitration clauses found them of no protection once they were hauled into California state court or into federal courts applying California state law.[17] Trial lawyers could "forum shop" national class actions in courts willing to disregard arbitration provisions.[18]

In that context, AT&T Mobility, in conjunction with its attorneys at Mayer Brown, devised a legal strategy to challenge the California decisions: construct an arbitration clause so plainly friendly and fair to consumers that any finding of the clause being "unconscionable" must be motivated by discrimination against arbitration, rather than a desire to protect substantive and procedural consumer rights. Because such discrimination would run afoul of the FAA's requirement that arbitration clauses be placed "on an equal footing with other contracts,"[19] federal law would preempt the application of state-court law to the contrary. And the AT&T Mobility contract was extraordinarily generous:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's website. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's website. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.[20]

No reasonable person could deem such a clause an artifice to render a corporate defendant immune from individual claims. And the trial court indeed made a factual finding that the clause permitted the vindication of individual claims. Nevertheless, the Ninth Circuit refused to enforce the arbitration clause, holding that its waiver of class action rights, even class action arbitration rights, made it unenforceable under California law.[21] Thus, while the Ninth Circuit acknowledged that the arbitration provision "essentially guarantee[d]" that AT&T would make whole every customer who complained, the fact that not every customer would complain made the provision unenforceable because absent class members would not have their rights vindicated.[22]

The Supreme Court reversed on a 5–4 vote, with justices Ginsburg, Breyer, Sotomayor, and Kagan dissenting.[23] The plaintiffs having conceded that California could not generate rules aimed at destroying arbitration or demand procedures incompatible with arbitration,[24] only a very small step of logic was required for the majority to determine that a court could not use judicially created doctrines against arbitration to effect what the state legislature could not.[25] As there was no dispute that the AT&T Mobility provision generated sufficient incentive for individuals to prosecute meritorious claims, California could not find this arbitration provision problematic: it was not a "groun[d] … for the revocation of any contract" as the exception in 9 U.S.C. § 2 provided.[26]

II. CONSUMERS BENEFIT FROM THE FREEDOM TO PRE-COMMIT TO INDIVIDUAL ARBITRATION IN LIEU OF CLASS ACTIONS.

As a threshold matter, it is worth considering whether permitting consumers to enter into contracts with arbitration clauses that preclude class action remedies benefits consumer welfare.

The courts and scholars offended by the *Concepcion* decision and AT&T Mobility's arbitration clause at issue in the case adopt reasoning that treats the class action procedure as an end in itself, rather than as a means to an end. But such logic is flawed; class action lawsuits are but a *means* of consumer protection, intended to permit vindication of small individual claims that the expense of litigation would otherwise make impossible to vindicate. But class action lawsuits are not the only mechanism enabling such a goal. It is a mistake to automatically assume that the interests of class action attorneys run parallel to those of consumers. Rather, as existing class action practice shows, the two groups are often at loggerheads.

Look at the type of arbitration provision that passed muster in the Supreme Court. AT&T Mobility covers the costs of the arbitration; consumers are entitled to a bounty if they win.

That is remarkable in two ways. First, consider how much money AT&T Mobility is willing to spend to avoid class actions, and imagine how much it must be saving by using alternative dispute resolution. Why is that not a damning indictment of the class action process as a means of vindicating consumer rights? Indeed, this leads to my second point. I have been an attorney representing class members objecting to or seeking relief in dozens of consumer class action settlements, and in every one of them, injured class members would have been better off with the AT&T Mobility provision than with what the class action system got them. In *Concepcion*, "the District Court concluded that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action."[27]

Certainly, there are scholars who view the purpose of the class action as the creation of deterrence,[28] but they are mistaking a collateral benefit with the underlying procedural purpose of the class action. As the Supreme Court has consistently held, the class action is a procedural joinder device. We accept that an attorney has the power to release the claims of absent class members without explicit consent for the sake of judicial efficiency only because the federal rules require that the due-process rights of absent class members be protected through an adequate-representation requirement[29]—and that necessarily means that the class attorneys should be viewed as having a duty to specific groups of *clients* rather than as being private attorneys general seeking to impose particular public policy goals for the good of society at large. Thus, treating the tail of the procedure to be wagging the dog of the substantive law is invariably viewed by the Supreme Court as a mistake—whether that mistake benefits plaintiffs or defendants.[30]

In short, there is nothing exceptional about a class action in vindicating individual rights. The unconscionability rule adopted by the California Supreme Court and applied by the Ninth Circuit in *Concepcion* incorrectly presumed that class actions in practice must be available for the vindication of certain consumers' rights, and therefore that courts must strike down a clause requiring mandatory individual arbitration as exculpatory and thus unconscionable. Both economic theory and empirical evidence demonstrate that these presumptions are incorrect, for three reasons.

First, class treatment is neither the only, nor necessarily the best, means of providing aggrieved consumers with meaningful relief. In fact, class action litigation suffers several pathologies that often make it a poor vehicle for the vindication of consumer rights: it is expensive, raising costs to consumers in the long run; it is slow-moving, bringing relief, if at all, long after class members have been harmed; even when class plaintiffs do succeed, class members face significant barriers to obtaining recovery; and class settlements often are a boon for class action attorneys but a bust for class members who recover little or nothing of value.

Second, arbitration is superior in many cases to class actions in vindicating consumer rights. Individual arbitration provides swift resolution of disputes; allows for easy and complete recovery; and does not pit the interests of consumers against an attorney tasked with representing their interests. Indeed, consumers consistently report that they prefer pursuing their claims in arbitration to class action litigation. Therefore, both for the individual complainant and for aggrieved individuals in the aggregate, a contract selecting individual arbitration often will afford consumers a better mechanism for obtaining meaningful relief than class action litigation.

Third, if class actions are a superior vehicle for vindicating consumer rights, there is no need to mandate their availability with respect to small-claims consumer class actions: market mechanisms will make them available to consumers. The marketplace includes a variety of mechanisms for addressing consumer complaints and reflects consumer preferences among these various dispute resolution mechanisms. In addition, selecting efficient complaint-resolution processes allows firms to pass cost savings along to consumers in the form of lower prices.

A. Even Successful Class Actions Frequently Fail to Provide Consumers with Meaningful Relief.

Class actions were designed to provide injured parties with a more efficient means of accessing justice, by aggregating claims for violations of individual rights.[31] Some commentators tout class actions as exceptional vehicles for vindicating consumer rights.[32] In practice, however, class actions have three significant structural deficiencies that often prevent consumers from obtaining meaningful relief.

First, even when the class members are awarded relief in some form, the average class action takes years to reach a settlement; thus, class members must wait a long time before they benefit from a successful class action. Second, even when the class action results in a victory for the class members, obtaining relief may require navigating byzantine procedures that impose significant transaction costs. Third, too often class actions reach settlements that reward class members with pennies on the dollar, if that. Taken together, these three problems result in many class actions that fail to provide consumers with meaningful relief for the violation of their individual rights.

1. Delay in Recovery

The nature of even successful class actions frequently leads to long delays before class members receive relief. The "typical class action" is characterized by "procedural complexity and slow pace."[33] A recent study of all class action settlements in federal courts in 2006 and 2007 found that consumer class actions on average take more than three years from the inception of the litigation to settlement.[34] Data from the states show similarly slow class action litigation. In California, for example, class actions take more than two years to proceed from filing to settlement or verdict at trial.[35] These studies may actually understate the delay because class recovery could be further delayed by the appeal of the approval of a class action settlement.[36]

Because a dollar today is worth more than a dollar tomorrow, the loss of the time value of money is an affirmative harm. And to the extent that delay increases the class attorneys' ability to claim greater fees vis-à-vis the settlement fund by inflating the lodestar, the delay harms class members by reducing their compensation. It is difficult to conclude that consumers receive meaningful relief when they receive it years after they have suffered harm.

2. Obstacles to Recovery

Even when class actions reach a final resolution that is favorable to consumers, it is still difficult for class members to obtain recovery. This difficulty follows from structural inefficiencies in the class action mechanism. Two significant practical difficulties are involved in delivering compensation to consumers.

First, the administrator of the class settlement fund or class damages award must identify the class members and notify them of the settlement or favorable judgment.[37] But even when individual class members are identifiable by name, it may not be feasible to find current addresses for most of them.[38] In theory, "publication notice" (notifying class members of settlement or judgment through advertisements in major periodicals) may compensate for lack of individual notice; but in practice, it, too, may prove ineffective.[39] Therefore, the available data indicate that identifying and notifying absent class members of their right to recovery "will often prove to be both difficult and inefficient."[40]

Second, class members may have to decipher and complete a complex settlement notice and claim form in order to receive compensation under the class settlement.[41] For example, the FTC objected to a recent class action settlement that not only "release[d] the claims of some 500,000 class members for, at best, pennies on the dollar" but did so in a way that required consumers to fill out a detailed and confusing questionnaire to obtain relief and thus "appear[ed] purposefully designed to make it difficult for consumers to make claims."[42] In a case I recently argued to the Third Circuit, the five-page claim form had told class members that they needed to provide evidence of the date of purchase to make a claim for more than $5, but the district court adjudicated the settlement as fair because class members could have submitted photographic evidence of product ownership; it's little wonder that class members made claims on less than a tenth of the settlement fund.[43] Similarly, in *Dewey* v. *Volkswagen AG*,[44] the Third Circuit and the district court disagreed as to whether owners of a million vehicles in an uncertified subclass were allowed to make claims for repair reimbursement from a settlement fund.[45] If sophisticated judicial officials could not parse the notice and settlement and come to the same conclusion, how could class members be expected not to err a substantial percentage of the time?

Indeed, the incentives for class action attorneys and defendants encourage the creation of claims processes that make it prohibitively difficult for class members to make successful claims. The structure of class actions encourages tacit collusion between class attorneys, who are trying to maximize the apparent value of the class settlement and thus their claim to fees, and defendants, who seek to minimize the costs of settlement.[46] By agreeing to a settlement process that appears to provide meaningful relief, but in operation imposes obstacles to actual relief, class attorneys and defendants can maximize the attorneys' fees and minimize the settlement costs to their mutual benefit at the expense of the class members.[47] The creation of artificial obstacles to relief is all too common because the award to the class and the agreement on attorney fees represent a package deal to defendants in class actions. When district courts fail to inquire into actual claims rates and class recovery and instead accept exaggerated fictional assumptions about the size of the settlement, any incentive for the class attorneys not to go along with the defendants' desire to minimize claims is eliminated.[48]

Such transaction costs may explain the "modest to negligible" claims rates in small-claims class actions where the settlement requires class members affirmatively to file claims.[49] For many consumers in such circumstances, it is simply not worth the hassle to pursue their claims. The concern of the Ninth Circuit in *Concepcion*, then—that individual arbitration was procedurally deficient because many individuals would not bother to seek relief through the arbitration process[50]—is neither unique to arbitration nor solved by class actions.

As Omri Ben-Shahar argues, the obstacles to recovery mean that the class action can end up as regressive wealth redistribution because the costs of litigation are borne across the board, but higher-educated consumers are better situated to take advantage of the claims process.[51] If anything, Ben-Shahar understates the problem, because the majority of the litigation costs go to relatively well-to-do attorneys (plaintiffs and defense) and experts and claims administrators, rather than to consumers.[52] The degree to which the class action system benefits attorneys, rather than class members, leads to my next point.

3. Inadequate Compensation

Although most successful class action litigation under Rule 23 is resolved in the form of a class settlement, such class settlements frequently provide little or no meaningful compensation to consumers. Indeed, a significant number of consumer class settlements do not provide consumers with any monetary relief whatsoever. This systematic under-compensation is the product of two structural problems in class actions. First, because class attorneys' fees generally come from the same source as the class members' compensation—the defendant—class attorneys settling class claims have a fundamental conflict of interest.[53] Second, to the extent that class attorneys exploit that conflict of interest, judges lack the necessary information or incentive to rectify self-dealing in most cases.

The principal reason for the failure of many class settlements to provide meaningful compensation is obvious: class attorneys have incentives to engage in self-dealing during the negotiation of class settlements, which often occur simultaneously with the negotiation of attorneys' fee payments.[54] Because class members, especially those in a small-claims consumer class action, have small stakes in the case and therefore usually do not closely monitor their attorneys' conduct, class attorneys often are able to obtain high fees without obtaining meaningful compensation for class members.[55]

Indeed, all three branches of government have recognized this economic reality. In enacting the Class Action Fairness Act (CAFA) of 2005,[56] Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where … counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."[57]

Similarly, the FTC has recognized that "[e]xcessive class action attorney fee awards represent a substantial source of consumer harm."[58] Indeed, the agency, at least in the Bush administration, objected to class settlements that it has concluded do not adequately protect consumers from self-dealing by the class attorneys.[59]

Courts also have recognized the harm to consumer welfare caused by the class attorney's conflict of interest.[60] As Judge Friendly put it, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush."[61] In other words, "the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals," given the possibility that he may trade a small class award for the relatively certainty of a high fee award.[62]

The empirical evidence indicates that in a significant number of cases, this conflict of interest leads to an inadequate class settlement. For example, the Senate report to CAFA canvassed a number of cases that illustrate that "state court judges … readily approv[e] class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."[63] And a RAND study found that the class attorneys' fee awards were greater than the total cash payment to class members in the state-court consumer class actions that were examined.[64] "[C]lass counsel were sometimes simply interested in finding a settlement price that the defendants would agree to" accept regardless whether it adequately compensated the class members.[65]

This risk of under-compensation may be particularly acute in consumer class actions. The Fitzpatrick study of federal class action settlements indicates that a higher proportion of consumer class actions than class actions in general are: (i) certified as settlement classes; and (ii) involve nonmonetary relief in whole or in part.[66] Settlement classes increase the risk of a "reverse auction" in which plaintiffs' attorneys compete to offer a defendant the lowest settlement price.[67]

In addition, the Fitzpatrick study indicates that nonmonetary relief, which is less likely to compensate class members, may be more prevalent in consumer class actions. The study found that 26 percent of consumer class actions in the data set provided for no cash relief at all; 30 percent included in-kind relief, in the form of coupons, vouchers, and the like, as at least part of the relief granted; and 37 percent involved injunctive or declaratory relief of some sort.[68] These data are particularly troubling because consumers are far less likely to be adequately compensated by in-kind or injunctive relief.

Coupon settlements. It is easy to see why class attorneys and defendants may prefer coupon settlements. They can use coupons to inflate the apparent value of the proposed settlement by claiming that the coupons' nominal value is the actual value to the class members.[69]

Coupon settlements, however, suffer from several flaws, including that "they often do not provide meaningful compensation to class members."[70] Indeed, in general, "[c]ompensation in kind is worth less than cash of the same nominal value,"[71] particularly in the case of nontransferable coupons.[72] Moreover, coupons often include "restrictions intended to make redemption difficult."[73] Unsurprisingly, therefore, the redemption rate for a coupon without a secondary market is a minuscule 1–3 percent, and cases abound in which only a few class members redeem their coupons.[74]

Although CAFA was partly designed to discourage the use of valueless coupons,[75] it does not apply to all class actions, and recent coupon settlements indicate that the problem persists. In Washington, D.C., a court recently approved a coupon settlement involving Envision EMI, an organizer of 2009 inauguration conferences.[76] According to the class complaint, 15,000 students paid over $2,300 to attend the conferences, but Envision EMI did not deliver what was promised. The class settlement provides the class members with two $625 coupons to attend future Envision EMI conferences—with the possibility that class members would not be able to use their coupons to attend the conference of their choice, given that only 10 percent of seats at any given conference will be allowed to redeem coupons. The court approved the settlement over the objection of several state attorneys general. Thus, the coupons help Envision EMI stay in business and force the class members to deal with the same firm that they allege failed to deliver a conference worth the more than $2,300 that they paid to attend it.

In another case, Missouri courts permitted class attorneys to walk away with $21 million in cash—twice a likely inflated lodestar—by valuing the unlikely-to-be-redeemed coupons at 100 percent of face value.[77] Worse, a number of federal courts have permitted settlements to avoid CAFA scrutiny by the simple use of a thesaurus to recharacterize "coupons" subject to CAFA as "gift cards" or "injunctive relief" that need no special treatment.[78] Surely CAFA's distaste for coupons was not merely a matter of semantics.

Cy pres. To the extent that CAFA has undermined the use of coupon settlements as a means for class attorneys to increase their fees at the expense of consumers, new tactics have taken their place. Thus, although CAFA addresses some self-dealing, it has also created a game of Whac-A-Mole in which class attorneys have created new methods for tacit collusion.[79]

One such tactic is the use of *cy pres* class settlements. In its original context, courts used *cy pres* to "give effect to a testator's intent" when a specified charitable gift "had been rendered impossible or impracticable because of exigent circumstances"; *cy pres* allows the court to "put[] the funds to the next closest use."[80] In theory, *cy pres* is a solution to the problem that occurs when class members do not receive compensation because few members make a claim on the settlement fund or when allowing direct claims would be prohibitively expensive.[81]

But in practice, *cy pres* "creates the illusion of class compensation."[82] For example, the court may order the defendant to make a payment of goods or services to a third-party charity while paying the class attorneys a fee—and the resulting benefits may redound only to the class attorney, the defendant, and the charity.[83] Like coupon settlements, *cy pres* may be used to "disguis[e] the true cost of a settlement to a defendant to maximize the share of the actual recovery received by the plaintiffs' attorneys."[84] If the charitable contribution is one that the defendant was making, anyway, the effect on the defendant is one of a change of accounting entries rather than any cost to the defendant or benefit to the class aside from the attorneys' fees.[85] The good news is that federal courts are starting to crack down on such abuses, if inconsistently.[86]

One solution would be to cease permitting class attorneys to simply recover based on the percentage of the settlement fund without regard to who actually gets the money from the settlement fund. If, as in the *Bayer* case, class attorneys are allowed to ask for $5.1 million from a $15 million settlement fund even though class members will ultimately receive less than $0.25 million of that fund,[87] class attorneys will never have the incentive to structure claims processes to ensure that class members will actually benefit from a settlement. Judge Lee Rosenthal correctly recognized the need to structure incentives *ex ante*, and discounts *cy pres* in calculating settlement benefit.[88]

Settlement benefits are similarly exaggerated by including the standard notice costs and settlement administration costs in the gross settlement fund. This falsely assumes that class members are indifferent between whether settlement money goes to third-party settlement administrators (often with relationships with class counsel) or to the class. Moreover, notice is a benefit to defendants, not the class: it is constitutionally adequate class notice that permits defendants to enforce the waiver and release in a settlement upon absent class members.[89]

And sometimes the attorneys don't even bother to pretend that the settlement benefits the class. Many class actions involve settlements in which the class attorneys receive fees that are disproportionate to the relief purportedly designed to benefit the class members. For example, the settlement in *In re Bluetooth Headset Products Liability Litigation* did not afford class members any monetary benefit but provided for $100,000 in *cy pres* awards to charities and $850,000 in attorneys' fees.[90] This type of rent-seeking by class attorneys is all too common and does not benefit class members.

Injunctive relief. All too often, courts approve settlements that purport to provide injunctive relief without determining whether the injunctive relief will actually benefit the class members supposedly represented by class counsel. In a case alleging that gasoline vendors are committing consumer fraud by failing to disclose the basic law of physics that liquid expands with temperature, one vendor settled by promising to provide "temperature-adjusted" gallons to consumers in the future. The district court accepted the economically illiterate reasoning that, because such gallons will be slightly larger in volume on average, it meant that future consumers, which would include some class members, will be getting free gasoline—as if the defendant could not adjust its prices to reflect the higher marginal costs.[91]

In class action litigation over the sugary spread Nutella, two federal district courts accepted claims that changing the product's slogan from "An example of a tasty yet balanced breakfast" into "Turn a balanced breakfast into a tasty one" was compensation for the former slogan's alleged consumer fraud—though the attorneys who appeared in the New Jersey class action were unfortunate to have their fee request shaved from $3.7 million to $1.1 million when a California federal judge rubber-stamped a similarly bloated fee for the identical settlement.[92]

The problem is that courts do not consistently evaluate the difference between prospective injunctive relief and retrospective injunctive relief, a difference that is critical in the consumer class action context. Prospective injunctive relief is not a benefit to the class. No changes in future disclosures will benefit consumers who have already been misled by previous statements.[93] Prospective injunctive relief does not compensate class members for past injuries.

Two hypothetical settlements demonstrate the problem with attributing prospective injunctive relief in a misrepresentation case to be a benefit to the class. Imagine the hypothetical consumer fraud class action *Seinfeld* v. *Kramer Non-Fat Yogurt*, where a class sues a shop selling "non-fat yogurt" that turns out to be full of fat.[94] If the parties settled for injunctive relief whereby the defendant agreed to correctly label its full-fat yogurt in the future, that would be of no benefit to the class for their *previous* injuries—even if, as here, there happened to be some overlap between the class members and the set of people who purchased non-fat yogurt in the future. The class members only benefit to the extent that they make additional purchases from the defendant, and that benefit is presumably reflected in the price they pay for those new purchases.

Another example: imagine the hypothetical consumer fraud class action *Gatsby* v. *West Egg*, where the class sues over West Egg selling packages of a dozen eggs that only have ten eggs in them. If the parties settled with injunctive relief that required West Egg to include at least 12 eggs in every "dozen eggs" package, that again provides no benefit to the class for their *previous* injuries, even if, once again, there happened to be some overlap between the class members and the set of people who purchased West Eggs in the future. The lack of benefit becomes even more apparent if West raises its price for a "dozen" eggs from $2.00 to $2.40.[95]

Note the problem of "leakiness" in both these settlements that demonstrates the inherent illusoriness of prospective injunctive relief in a consumer class action. A defendant forced to change business practices by prospective injunctive relief can simply choose to pass along those additional costs to its customers: West Egg customers get 20 percent more eggs than before the settlement but are paying 20 percent more for the package. There is no benefit even to future purchasers, much less the class. An injunction may require a defendant to change its business practices, but if the injunction does not also regulate the defendant's pricing, any increase in the cost of business will be passed along to the consumer.

In contrast, retrospective injunctive relief, provided to class members with durable goods, can be a benefit. For example, in *Hanlon* v. *Chrysler Corp.*,[96] plaintiffs alleged that Chrysler sold vehicles with a defective trunk latch; the case settled with Chrysler agreeing to repair class members' vehicles. That injunctive relief directly compensated the *Hanlon* class: before the settlement, class members owned an allegedly defective vehicle that was hypothetically worth less than what they paid for it; after the settlement, class members owned a vehicle that had been fixed in a recall, increasing its value at the margin. The *Hanlon* settlement may be problematic for other reasons (class members who had already sold or totaled their vehicles received nothing), but to the extent that the settlement was responsible for the retrospective injunctive relief, that injunctive relief was a benefit to the class. Unfortunately, courts all too frequently fail to make the relevant distinction.

Courts also all too frequently fail to inquire into whether the proposed injunction makes any difference at the margin to consumers. Class counsel walked away with a $13 million fee in the meritless *Blessing* v. *Sirius XM*, Inc. class action litigation because they convinced a district court that a five-month offer to provide Sirius subscriptions for $12.99 per month was worth $180 million to class members.[97] This injunctive relief was of little solace to my client and other class members, as they were paying under $5 per month for their service. Any class members who accepted the "relief" would have been nearly $100 worse off than if they had simply called up Sirius and asked for the discounted price.[98] Neither the district court nor the Second Circuit Court of Appeals even tried to refute this truism when rubber-stamping the settlement; both opinions simply ignored the argument and provided no evidence that the court had a reasoned response to it. Class counsel effectively acted as a marketing agent to improve the profits of their purported adversaries rather than as a fiduciary for their clients—though there is virtually no chance that any state bar disciplinary authority would punish class counsel for doing so.

Indeed, in some cases, the problem of under-compensation and self-dealing is so severe that class settlements unambiguously harm class members by putting them in a worse position than they were in before the litigation began. The CAFA Senate report discusses two such cases, including the "infamous Bank of Boston class action settlement," in which an Alabama state court approved a settlement in which the attorneys' fees were subtracted from class member escrow accounts, thus leading, in many cases, to class members losing money to pay the class attorneys' $8.5 million fee.[99]

The problems arising from the class attorneys' conflict of interest are inevitable, but courts do not have any effective means to police all abusive class settlements. Although courts are tasked with ensuring that class attorneys act as fiduciaries for the class as a whole,[100] they often do not have the information necessary to measure whether the class attorney and defendant have arrived at a fair settlement; accordingly, courts cannot easily act to prevent attorney self-dealing.[101] Moreover, courts' incentives are poorly structured: approving an unfair settlement will rarely result in reversal, both because appellate review tends to be deferential and because objectors rarely have the financial incentive to follow through on an appeal. The incentive to follow through with an appeal is perversely muted when an appeal would have a high likelihood of success: class counsel will always have more at stake than an objector will, and a for-profit objector whose appeal might be successful can maximize his financial return by a quid pro quo with the class counsel—being paid to walk away—at the expense of the class. Indeed, for-profit objectors are usually better off if they *lose* objections at the district-court level and proceed with an appeal because that maximizes their chances that they will be paid to go away; such payments are substantially more lucrative than the possibility of fees for a successful objection. This all adds up to courts having little incentive to assess settlement proposals and little information with which to do so.

A court's comparative lack of information may explain the weight that courts afford in reviewing class settlements to the "judgment of the parties," as presented by the attorneys, as to whether the settlement "is fair and reasonable."[102] It perhaps makes sense to defer to the judgment of the parties as to the fairness of a settlement between the defendant and the class members. But given their conflict of interest, class attorneys' judgment cannot be expected to represent the class members' interests fairly in all cases: class counsel wishes to maximize its fees, while the defendant is largely indifferent as to the division of the spoils.[103] Therefore, there is a significant risk that judges will approve class settlements that do not provide meaningful relief to class plaintiffs, particularly when the class relief comes in the form of in-kind or injunctive remedies that are difficult to value.

Courts could do more in consumer class actions to reduce the asymmetries. When confronted with a multi-district litigation and multiple competing class actions, courts often ask the parties to cooperate and divvy up the work amongst themselves. Instead, they should encourage competition: auction off the right to represent the national consumer class to the qualified firm willing to guarantee the highest settlement for the lowest price to the class. If the rent-seeking is competed away, class members will be more likely to benefit.[104]

In sum, class actions are far from an exceptional means of affording consumers meaningful relief. Relief via class action is almost always untimely. Recovering it involves significant transaction costs, and when consumers do obtain such relief, it is often less than they deserve. Thus, in many cases, class actions prove particularly inadequate to the task of affording consumers access to meaningful relief.

B. Individual Arbitration Often Affords Consumers Greater Access to Meaningful Relief.

While class actions are inefficient, typically involving protracted litigation over collateral issues such as discovery and class certification, arbitration provides for a speedy resolution of claims and benefits consumers with small claims by reducing the costs of dispute resolution below its potential expected return. Thus, by comparison, class actions are not exceptional and, indeed, in many cases, are less effective than arbitration in providing consumers with meaningful relief.

The comparative efficiency of arbitration over class remedies and litigation is borne out by empirical evidence. "Virtually every study considering the issue has concluded that results in arbitration are far swifter than those in litigation."[105] For example, a recent study by the Searle Center found that "the average time from filing to final award for the consumer arbitrations studied was 6.9 months."[106] By contrast, federal class actions take more than three years on average to reach settlement. The cost of this delay is borne by the injured class members. Indeed, legal ethics rules prohibiting contact with a "represented party" can be used by plaintiffs' counsel to prevent a defendant from providing satisfactory customer service once a class is certified.[107]

In addition to being more efficient, arbitration offers consumers rates of recovery that are comparable with, and perhaps superior to, class actions. A survey of the empirical literature shows that "most measures—raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed—do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[108] Indeed, in many cases, recovery rates in arbitration are likely to be more favorable to consumers than recovery rates in class actions. A 2007 report by the American Arbitration Association showed that approximately 60 percent of arbitrations were settled by mutual agreement or withdrawn; of the cases that reached decision, consumers prevailed 48 percent of the time when they brought the action.[109] By contrast, 80 percent of putative consumer-initiated class actions are never certified,[110] leaving the putative class in those cases with either no recovery or with nuisance levels of recovery, reflecting class counsel's fear of losing the certification motion. Of the remaining 20 percent of putative class actions that are certified, the vast majority settle.[111] Class settlements, moreover, in many cases offer a particularly ineffective vehicle for consumer recovery, given the barriers to recovery and the dead-end problems discussed above. Well-designed arbitration agreements have multiple features designed to avoid these types of problems and thus to provide consumers with a more realistic opportunity at recovery than class actions.

Consumers, unsurprisingly, prefer arbitration over litigation. In 2005, Harris Interactive surveyed 609 adults who had participated in some type of arbitration, finding that they reported several advantages of arbitration over litigation: 74 percent said that it was faster, 63 percent said that it was simpler, and 51 percent said that it was cheaper than litigation.[112] Nearly two-thirds of those surveyed reported themselves likely to arbitrate again, including one-third of those who had lost their claims.[113] And a 2003 study by the American Bar Association of approximately 700 lawyers in its litigation section found that over 86 percent believed that arbitration was as or more cost-effective than litigation, with 75 percent reporting the outcomes in arbitration equal to or better than the outcomes in litigation.[114]

Studies to the contrary are usually cherry-picked or fail to make the appropriate apples-to-apples comparisons. The notorious 2007 Public Citizen study, which outraged readers with a finding that "consumers lost 94 percent of the time," focused solely on collections cases, where consumers lose 96 percent of the time in court:[115]

> Moreover, even in the cases where Public Citizen identifies the business as the prevailing party, the consumer was frequently successful in reducing the amount the business sought. Consumers won reductions in 37.4 percent of the cases that went to hearing, with a median reduction of $824. More impressive, in 3,632 of the 16,054 cases where there was no hearing because the respondent defaulted, the arbitrator refused to award the entire amount the business requested. The median reduction for consumers was $599. This may be because "[i]n cases administered under the NAF Code of Procedure, the arbitrator considers all evidence, whether or not there is a response to the claim." This added layer of protection is unavailable to consumers in civil litigation, where

> default judgments are entered on sums certain without consideration of the underlying evidence. The average consumer thus comes out ahead in arbitration, compared with court.[116]

Certainly, class members without meritorious claims will be better off in the class action arena, where the threat of expensive litigation can be used to negotiate an *in terrorem* settlement that benefits the class representative and the class counsel, if no one else. But why would we want to encourage that? The idea that class actions serve a deterrent effect is undermined by the reality of class action practice: good behavior is just as subject to profitable *in terrorem* class actions as bad behavior, so long as a colorable complaint can be constructed. Class actions provide little incentive at the margin to avoid bad behavior. This is why AT&T Mobility finds it preferable to offer a $10,000 bounty to consumers to take it to arbitration.

C. Mandatory Arbitration Clauses Are a Consequence of Consumers' Demand for Lower Prices.

Even assuming that class actions are an exceptional remedy for consumers, there is no need for courts to prohibit consumer-friendly individual arbitration agreements. If class actions are more efficient at providing consumer relief than an arbitration agreement such as AT&T Mobility's, the market will make them available for two reasons. First, the perceived quality of a company's process for resolving customer complaints is reflected in brand image and loyalty, and thus a more efficient process leads to increased demand and the ability to command above-market prices. Second, the efficiency of complaint-resolution processes results in cost savings that are passed along to consumers in the form of lower prices.

Customers implicitly take complaint-resolution mechanisms into account when making purchase decisions. Successful complaint resolution creates positive feelings in individuals toward a company, fostering loyalty and increasing the likelihood of repeat or continued business in individuals who otherwise had a negative experience.[117] Moreover, the quality of a company's complaint resolution is reflected in brand image and reputation, as customers share their experiences through positive recommendations or denigration.[118] Brand image and customer loyalty are significant drivers of purchase decisions, allowing firms with loyal customers and positive brand image to charge a premium over their competitors.[119] Customers are thus, in effect, willing to pay a premium to purchase products and services from companies with effective complaint-resolution mechanisms.

Moreover, to the extent that efficient complaint-resolution processes reduce transaction costs for businesses in resolving complaints, these savings are passed along to consumers.[120] The Supreme Court has long recognized as much in the admiralty context;[121] the same market pressures do not disappear on dry land.[122] To the extent that individual arbitration can lower transaction costs compared with class action litigation and arbitration, customers will directly benefit. Customers may therefore choose companies offering efficient complaint-resolution mechanisms in order to capture these cost savings.

The market already reflects complaint resolution through customer loyalty and pricing. Customers make purchase decisions based on their personal preferences as to the balance of cost and quality of customer service, and they reward companies that provide them with better service at lower prices. Allowing customers to select providers based on their preferences is not substantively unconscionable.

The idea that consumers are unfairly forced into arbitration simply because the clauses are non-negotiable is untenable. As Judge Easterbrook has noted:

> Ever since *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), enforced a forum-selection clause printed in tiny type on the back of a cruise-ship ticket, it has been hard to find decisions holding terms invalid on the ground that something

is wrong with non-negotiable terms in form contracts. *See also, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (unequal bargaining power does not justify refusal to enforce an arbitration clause in a form contract); *Seawright v. American General Financial Services, Inc.*, 507 F.3d 967 (6th Cir.2007). As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297 (1981). If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss-though if bench trials reduce the cost of litigation, then sellers may be better off even at the lower price, for they may save more in legal expenses than they forego in receipts from customers.

There is no difference in principle between the content of a seller's form contract and the content of that seller's products. The judiciary does not monitor the content of the products, demanding that a telecom switch provide 50 circuits even though the seller promised (and delivered) 40 circuits. It does not matter that the seller's offer was non-negotiable (if, say, it offered 40-circuit boxes and 100-circuit boxes, but nothing in between); just so with procedural clauses, such as jury waivers. As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention. Making the institution of contract unreliable by trying to adjust matters *ex post* in favor of the weaker party will just make weaker parties worse off in the long run. *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir.1992) ("The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the other side] will demand compensation for bearing onerous terms.").[123]

Thus, if class actions provide more efficient mechanisms for resolving consumers' complaints than an arbitration agreement, the market will take that into account when pricing products and services. If, however, the arbitration agreement is efficient, the business will be able to pass the cost savings along to consumers in the form of lower prices. In either instance, the market will, without aid from the courts, protect consumer welfare—assuming that consumers have that choice *ex ante* to precommit to arbitration.

The Supreme Court's decision to protect that consumer choice in *Concepcion* has thus benefited consumers. To the extent that consumers—or even a substantial minority of consumers—agree with Public Citizen and trial lawyers about the horrors of mandatory arbitration, businesses will find it profitable to advertise the absence of such clauses from their contracts. It is precisely because consumers are better off in a world where they have the choice of mandatory arbitration that the plaintiffs' bar is aggressively seeking to abolish that choice in the courts, in the legislatures, and in the regulatory arena. Sound public policy requires rejection of those arguments to avoid an unfair wealth transfer from lower- and middle-class consumers to wealthy attorneys.

III. FROM CONCEPCION TO ITALIAN COLORS: THE FUTURE OF CLASS ACTIONS

The Supreme Court's grant of *certiorari* from the Second Circuit's ruling in *American Express* v. *Italian Colors Restaurants*, if the Court reaches a decision on the merits, should help illuminate the scope of *Concepcion*'s holding and the future of class action litigation. In the wake of *Con-*

cepcion, some scholars and activists have argued that the decision will largely eliminate class action litigation. Indeed, in a particularly broad form of this argument, Brian Fitzpatrick has claimed that class actions are dead after *Concepcion*: "Although many commentators have warned that [*Concepcion*] could lead to the end of consumer class actions, this may not even be the half of it: it is possible the decision could lead to the end of class actions against businesses across most—if not all—of their activities."[124]

I disagree. Certainly, *Concepcion* has resulted in the elimination of *some* class actions; Public Citizen identifies 76 class actions short-circuited by courts citing *Concepcion*.[125] And certainly, Fitzpatrick's premise—*Concepcion* means that every class action based in a commercial transaction is potentially subject to an arbitration agreement—is correct. But "potentially subject" does not mean "actually subject."

At a minimum, class actions in the employment- and securities-law arenas should remain commonplace after *Concepcion*. In the consumer context, although the sellers of big-ticket items may find the savings from arbitration sufficient to incur the transaction costs of drafting enforceable arbitration clauses, consumer class actions more broadly should be expected to survive *Concepcion*. In *Italian Colors*, the Supreme Court has the opportunity to clarify the scope of its *Concepcion* holding, but it is unlikely to adopt a rule that precludes all or even most consumer class actions.

Employment class actions. *Concepcion* does not change the law of employment arbitration: the Supreme Court held in 2001 in *Circuit City Stores* v. *Adams* that employers could require arbitration of Title VII claims because arbitration was just a forum-selection clause.[126] The last 11 years have not seen the death of the employment class action in federal court, however. Some employers find requiring arbitration worthwhile; others do not.[127] Even when there are arbitration agreements, federal courts have been willing to let employees argue their way out of them: consider *Jones* v. *Halliburton Co.*,[128] the subject of a recent documentary that had much the same scary claim as Fitzpatrick's paper.[129] Jones attempted to arbitrate her discrimination claim against Halliburton, didn't like the way the arbitration was going, and filed a federal complaint with a whole new set of tort claims that the Fifth Circuit said precluded arbitration, putting Halliburton through a few million dollars of attorneys' fees and much more costly publicity before a jury threw out her claims after trial.[130] (The National Labor Relations Board has attempted to undo *Adams* by declaring mandatory arbitration clauses to be an unfair labor practice, but the courts have been largely skeptical of their position.)[131]

Securities class actions. Similarly, nothing about *Concepcion* changes the world of securities litigation. Fitzpatrick says that nothing stops corporations from requiring shareholders to agree to arbitration rather than class action securities-law remedies, but that was the status quo before *Concepcion*. If corporations could really force public shareholders to arbitrate federal securities claims and derivative shareholder disputes, they would have done so already. But no publicly traded corporation requires arbitration of shareholder disputes because the business community has been reluctant to require arbitration in the securities context absent a safe-harbor ruling from the Securities & Exchange Commission.

Not only has the SEC thus far refused to grant such a safe-harbor ruling, but the commission, without much legal authority, blocked an arbitration clause in an initial public offering (IPO) in the 1980s by Franklin First Financial.[132] The most recent corporation that attempted to innovate by proposing an arbitration clause in its IPO, Carlyle, was quickly mau-maued into withdrawing its proposal.

Carlyle's withdrawal of its proposal is disappointing. Because the provision was to be established in an IPO, no preexisting shareholder would have been "forced" into accepting the arbitration clause. It is far from clear that corporations generally even want arbitration instead of class actions to resolve securities-related disputes; there seems to be a tacit understanding that paying protection money to class counsel in exchange for a broad class waiver is a relatively cheap means of resolving lots of potentially disruptive litigation. That may be rent-seeking and bad public policy and an unfortunate tax on shareholders,[133] but it doesn't mean that defendants don't prefer it. Still, Carlyle's arbitration provision may well have benefited shareholders: the clause would not have prevented the application of penalties routinely meted out by the Department of Justice and the SEC; given that such penalties are sufficiently draconian as to already create principal-agent problems among officers, directors, and shareholders,[134] and given that well over 98 percent of meritorious civil securities litigation is simply piling on existing public disclosures,[135] it is hard to say what permitting parasitical—or worse, meritless—civil litigation adds to investor benefit. One would thus have expected a Carlyle stock with an arbitration clause to trade at a premium compared with securities without an arbitration clause: the boom in the Rule 144A private market[136] suggests how beneficial it is for business entities to avoid the additional marginal litigation and regulation expense from going public.[137] Unfortunately, that natural experiment will have to wait for a braver company or for a different political environment.

Consumer class actions. When it comes to consumer litigation, multiple barriers will keep the class action alive. First, there are transactions costs in shifting from the default rule of "everyone goes to the courthouse" to an arbitration, and most consumer transactions do not have room for those kinds of costs. Thus, if you're buying Bluetooth headsets or Rice Krispies or Breyer's ice cream or diapers or a car seat or gasoline—all of which have been the subject of questionable class action settlements that the Center for Class Action Fairness has recently litigated—it is highly unlikely that the vendor is going to go through the trouble of constructing a process that creates an enforceable arbitration agreement.

That leaves the big-ticket items: cars, long-term cell-phone contracts, financial services. And I fail to see the problem there . These are all competitive markets, and vendors have the incentive to provide competitive services and prices. Forum-selection clauses are part of that bundle. If consumers dislike mandatory arbitration clauses and the lower prices that come with them (for any savings will largely be passed on to the consumer in a competitive market), they will switch companies.

Second, *Concepcion* says only that courts cannot take discriminatorily unfriendly views of arbitration, not that they cannot fairly apply unconscionability doctrines to arbitration clauses. Thus, the extraordinarily friendly arbitration provision in the AT&T Mobility contract makes a huge difference. Federal and state courts still strike down as unconscionable arbitration clauses that are substantially less friendly than the AT&T clause.[138] They perhaps do so more often than *Concepcion* anticipates, but the distaste of many courts for arbitration, combined with other Supreme Court cases prohibiting the use of arbitration to bar claims entirely,[139] means that any arbitration clause cannot impose particularly onerous costs on access to dispute resolution.

In the case of *Italian Colors*, doing so appears to have been civil disobedience of a Supreme Court decision that the Second Circuit did not like.[140] The Second Circuit based its decision on the premise that, in the absence of classwide arbitration, it would be infeasible for an individual claimant to bring an antitrust claim, given the expense of expert witnesses. In a sharply worded dissent from the circuit's decision to deny an en banc (full-circuit) rehearing, Chief Judge Dennis Jacobs, joined by two of his Second Circuit colleagues (in addition to two other dissenters),[141] argued that the court's decision in *Italian Colors* was "incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements" and that the court's opinion "evaded the broad language and clear import" of *Concepcion*.

Certainly, an antitrust claim alleging an abuse of market power presents a different scenario for arbitration clauses from that of arbitration clauses from participants in a competitive market: we are less concerned about the latter because we can be confident that any gains from the arbitration clause will be passed along to consumers. (That said, this antitrust claim looks particularly weak. Even aside from the fact that so-called tying arrangements are not anticompetitive,[142] American Express hardly has any sort of market power with the retail industry; any number of vendors refuse to do business with it.) But the Second Circuit erred in assuming that class arbitration is the only way to achieve aggregate arbitration. The confidentiality provisions of an arbitration clause need not preclude an attorney from using the same expert witness report in multiple arbitrations and thus making the cost of an expert non-prohibitive; the resulting aggregate litigation will be opt-in, rather than opt-out, but is hardly infeasible. American Express did not help its case by failing to put evidence in the district court that an individual company *could* prevail on a meritorious antitrust claim (and if they lose at the Supreme Court, it will be because the Court refuses to inquire into the fictional findings of the Second Circuit[143]), but, as Judge Jacobs's dissent from rehearing en banc noted,[144] if plaintiffs can defeat arbitration clauses by forcing litigation over the feasibility of proceeding with arbitration, the exception will swallow the rule and destroy the advantages of arbitration to consumers. Corporations seeking to use mandatory arbitration clauses should consider rewriting the clauses to preempt the sort of arguments made in *Italian Colors* with more explicit provisions for voluntary joinder of claims and opt-in aggregate litigation.

But that sort of constraint proves that *Concepcion will* not create the parade of horrors suggested by the academic community. The likely equilibrium will find corporate defendants unlikely to enforce arbitration clauses that do not provide sufficient incentive to prosecute individual claims; one hopes that the Supreme Court's decision in *Italian Colors* is nuanced enough to avoid the dangers Chief Judge Jacobs warned of. Bright-line rules have advantages. That both parties have asked for a holding on narrow grounds within existing precedent, rather than for a broad-sweeping rule, suggests that whatever the Supreme Court decides in *Italian Colors* will have far less effect than what advocates on either side are contending in the run-up to the oral argument.

Class actions have their place in the litigation system, but have been prone to abuse, with disproportionately little of the resulting diversion of wealth from productive sectors of society to the consumers and shareholders whom the class action device was supposed to benefit. The optimal number of class actions is certainly greater than zero but also certainly less than the number we have today. (That 96 percent of all mergers are challenged in aggregate litigation alleging breach of fiduciary duty for failure to disclose, and then almost invariably quickly settled for trivial disclosures, is correctly characterized by Professor Coffee as "polite extortion."[145]) Yet opponents of arbitration have largely failed to address these problems, and treat class actions as an end in themselves, rather than as a means to an end. Giving consumers the choice of pre-committing to arbitration arrangements can reduce this litigation tax, and reduce inequality-exacerbating wealth transfers from lower- and middle-class consumers to wealthy attorneys. And competition from alternative dispute resolution might prompt the organized bar to engage in the sort of reform that better ensures that class action settlements benefit consumers, rather than attorneys.

Endnotes

[1] *In re American Express Merchants' Litigation*, 667 F.3d. 204 (2d Cir. 2012), *cert. granted*, 133 S.Ct. 594 (U.S. Nov. 29, 2012) (No. 12–133).

[2] 131 S.Ct. 1740. I founded and manage litigation for the Center for Class Action Fairness, which filed an *amicus* brief for the petitioner in *Concepcion*, co-written by Brian P. Brooks, Charles E. Borden, R. Seth Davis, and myself. Some of the material in this paper originally appeared in that brief; other material in this paper has originally appeared in other briefs filed by Center attorneys, including myself; still other material first appeared on the Manhattan Institute's *Point of Law* website. Any errors in this paper, however, are entirely my responsibility. The Center for Class Action Fairness is not affiliated with the Manhattan Institute.

[3] *E.g.*, Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, San Francisco Chronicle (Nov. 7, 2010); Editorial, *Gutting Class Action*, N.Y. Times (May 12, 2011); Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation In The Wake Of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 623 (2012) ("Class actions are on the ropes"); Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 Green Bag 2d 275 (2011); Ann Marie Tracey and Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 Loy. L.A. L. Rev. 435 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 Ore. L. Rev. 703 (2012); Daniel Fisher, *Has Scalia Killed The Class Action?*, Forbes.com (May 20, 2011), http://www.forbes.com/sites/danielfisher/2011/05/20/has-scalia-killed-the-class-action/ (quoting Public Citizen); *AT&T v. Concepcion Supreme Court Ruling Bad News for Future Class Actions*, Gamepolitics.com (Apr. 28, 2011) http://gamepolitics.com/2011/04/28/atampt-v-concepcion-supreme-court-ruling-bad-news-future-class-actions (quoting Jennifer Mercurio, Vice President & General Counsel for the Entertainment Consumers Association (ECA) as calling decision "death knell to class action lawsuits").

[4] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

[5] FED. R. CIV. P. 1-86.

[6] Thomas B. Leary, *The FTC and Class Actions*, Federal Trade Commission (Jan. 26, 2009), http://www.ftc.gov/speeches/leary/classactionsummit.shtm#N_3_ (last visited Jan. 25 2013); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356 (1967).

[7] *Stolt-Nielsen v. Animal Feeds International*, 130 S. Ct. 1758 (2010).

[8] *Id*.

[9] *E.g.*, Carter Wood, *Trial lawyers association outlines its 2010 legislative agenda*, Point of Law (Jan. 11, 2010, 5:43 PM).

[10] Even when consumers can opt out of mandatory arbitration clauses *without* paying a higher price, few find it worthwhile to do so. Ebay cleverly took a tactic of giving existing Ebay users an affirmative option to opt out of the mandatory arbitration clause. Despite a campaign by Public Citizen to recruit Ebay customers to do so *en masse*, few did. Ebay gets the best of both worlds: its customer base not subject to arbitration is too small to attract trial lawyers as a target for class actions, while no one can complain that its arbitration clause is unconscionable. One of the reasons that trial lawyers can exploit the class-action device is because few consumers use the opt-out or objection mechanism to complain about unfair class action settlements designed to benefit the attorneys at the expense of their putative clients. *Cf*. Christopher Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71 (2007). There is a certain irony that Ebay is using the same transactions-cost problem to preclude class actions in the first place. Given the claims of anti-arbitration advocates that it is the "mandatory," rather than the "arbitration" part of the clause they object to, the business community might wish to call the trial bar's bluff and adopt Ebay-like tactics where feasible, and end any dispute over whether consumers are "forced" into arbitration. Even something as simple as a $5 credit for accepting a default mandatory arbitration clause instead of opting out of it would be telling.

[11] Ted Frank, *Trial lawyers and AT&T Mobility v. Concepcion: arbitration for me, but not for thee*, Point of Law (Dec. 7, 2010, 12:23 PM), http://www.pointoflaw.com/archives/2010/12/trial-lawyers-a-3.php.

[12] *Compare* Public Citizen, The Arbitration Trap, (Sept. 2007) *available at*, www.citizen.org/publications/release.cfm?ID=7545 *with* Peter B. Rutledge, Arbitration: A Good Deal for Consumers (United States Chamber Institute for Legal Reform, April 2008) *and* Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, Disp. Resol. Mag., Fall 2008, at 30.

[13] *Id. E.g.*, Maddy Sauer and Justin Rood, *Sex Assault Suit Vs. Halliburton Killed*, The Blotter (Feb. 6, 2008) http://abcnews.go.com/Blotter/story?id=4249898&page=1 (incorrectly stating that lawsuit that would be arbitrated was "killed").

[14] *See* John Warner Defense Authorization Act for Fiscal Year 2007, 10 U.S.C. § 987(b) (2006).

[15] For example, CFPB director Richard Cordray recently complained that 9% of bank customers pay 84% of overdraft fees, with the implication that regulation is needed to correct this supposed imbalance. http://www.consumerfinance.gov/speeches//prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/. Of course, as Shannon Phillips points out, what this statistic really reflects is that the vast majority of account holders use their accounts responsibly: if someone in that 9% were to do a better job of balancing their checkbook, they'd move into the 91%. http://themissinglinc.com/2012/05/07/lies-damned-lies-and-statistics/. But CFPB regulation would likely punish the 91% to protect the 9% from themselves. Except that without the overdraft fees, banks will find it unprofitable to serve these customers in the first place, and will instead charge monthly fees that significantly reduce access to the banking system for both the responsible and irresponsible lower middle class. But at least regulators can feel better that they stopped overdraft fees.

[16] *E.g.*, *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002). Stephen A. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L.Rev. 185, 186-187 (2004).

[17] *E.g.*, *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F. 3d 976 (9th Cir. 2007).

[18] Because class action lawsuits, by definition, include multiple plaintiffs, they uniquely afford plaintiffs' attorneys the opportunity to "shop" their lawsuits to jurisdictions with substantive laws or procedural rules likely to increase the value of their claims. To remedy this forum-shopping problem, in 2005, Congress passed the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (CAFA), which required that national class action suits with a sufficiently significant amount in controversy are removable to federal court. Nevertheless, the absence of a federal common law under *Erie v, Tompkins*, 304 U.S. 64 (1938), means that even though such class actions are heard in federal court, they apply the substantive law of a forum state. *See generally* Michael Greve, *The Upside-Down Constitution* 221-42 (2012). CAFA has reduced some of the worst abuses of class-action forum shopping, but some federal courts remain better than others for bringing class actions. Ted Frank, *The Class Action Fairness Act Two Years Later*, AEI Liability Outlook, (March 2007), *available at* http://www.aei.org/files/2007/03/27/20070327_Liability.pdf.

[19] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); 9 U.S.C. § 2.

[20] *Concepcion*, 131 S.Ct. at 1744. The guaranteed minimum recovery was increased in 2009 to $10,000. *Id.* at 1744 n.3.

[21] *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (2009).

[22] *Id.* at 849 n.9.

[23] *Concepcion*, 131 S.Ct. 1740.

[24] *Id.* at 1747-48.

[25] *Id.* at 1747 (*quoting Perry v. Thomas*, 482 U.S. 483, 493 (1987)).

[26] *Id.* at 1750-53.

[27] *Id.* at 1753.

[28] *E.g.*, Brian Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Penn. L. Rev. 2043, 2047 (2010); *cf.* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 Colum. L. Rev. 1534 (2006).

[29] Fed. R. Civ. P. 23(a)(4); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *see generally Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2550 (2011).

[30] *E.g., Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S.Ct. 1431 (2010) (federal plaintiffs have right to bring class action, notwithstanding state law precluding use of class action to seek punitive damages); *Dukes*, 131 S.Ct. 2541.

Even in terms of deterrence, the class action is a clumsy device. Because attorneys' incentives are to bring "big" cases, rather than "high-merit" cases, the deterrence value is substantially undermined. Bank of America gets sued over its overdraft fees because it's big, rather than because it did something wrong. (The Southern District of Florida MDL that Bank of America settled paid class members nine cents on the dollar of alleged damages, but the class attorneys $123 million for what was virtually a nuisance settlement.) And if Bank of America actually did something wrong, the attorneys willing to settle quick and cheap lets it get away with that, because they have still made billions on something the attorneys claim was illegal. When attorneys can wildly profit from nuisance settlements against deep pockets because they do not have to ensure that their clients actually receive any proceeds, deterrence is hurt, because the good companies are getting taxed by the class action system almost as much as the bad actors are.

[31] *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 71, 77 (2003).

[32] *E.g.*, J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1738 (2006); National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 377 (1998).

[33] John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986).

[34] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010).

[35] *See* Office of Court Research, Administrative Office of the Courts, Fingdings of the Study of California Class Action Litigation 2000-2006: First Interim Report 15-16 (Mar. 2009), *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf.

[36] *See generally* Fitzpatrick, *The End of Objector Blackmail*, 62 Vand. L. Rev. 1623,1624 (2009).

[37] *See* Fed. R. Civ. P. 23(e)(1); Martin Redish et al., Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010).

[38] *See* Robert H. Klonoff *et al., Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 730-31 (2008).

[39] *See id.* at 731-32.

[40] Redish, *supra* note 37, at 618; *accord* Klonoff, *supra* note 38, at 748.

The problem is especially troubling in the securities context, where I have found that the pattern and practice is for settlement administrators to delay requests for lists of individual class members from brokers so that individualized notice goes out too late for such class members to actually object to unfair settlements or fee requests. When the class member complains about the late notice, the settling parties pretend to be surprised that the broker took several weeks to provide the list of individual names, and point fingers at the broker—even though brokers rarely, if ever, provide the instantaneous response to the settlement administrator that the administrator's notice procedures assume. Of course, courts presume that parties intend the reasonably expected consequences of their actions. Should the securities defense bar continue to agree to notice procedures that inevitably result in inadequate notice to class members, securities litigation defendants could find themselves in an unfortunate situation where they have paid millions of dollars to settle a case without obtaining an enforceable waiver; all it would take is an entrepreneurial plaintiffs' lawyer to bring a second class action on behalf of shareholders who did not make claims the first time around, together with perfunctory discovery of the settlement administrators' expectations. *Cf. Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012) (refusing to enforce class action settlement waiver where parties failed to give adequate individualized notice). The malpractice liability would be tremendous; it is surprising that defense attorneys countenance such tactics by plaintiffs to deter objections from individual investors who are unlikely to have the incentive to file a substantive objection.

[41] *See* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 2, 119 Stat. 4, 4 (Feb. 18, 2005); *see also* S. Rep. No. 109-14, at 4 (2005) (Senate Report on CAFA).

[42] Intervener FTC's Mot. for Stay 1, 17-18, *Cass v. AmeriDebt, Inc.*, No. 01 CH 20350 (Ill. Cir. Ct. 2004), *available at* http://www.ftc.gov/os/2004/04/040412motion4stay.pdf.

[43] *In re Baby Products Antitrust Lit.*, No. 12-1165 (3d Cir.).

[44] 681 F.3d 170 (3d Cir. 2011).

[45] *Compare id.* at 176 *with Dewey v. Volkswagen*, 728 F. Supp. 2d 546, 597 (D.N.J. 2010).

[46] *See generally* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-84 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery.").

[47] In some cases, the complexity of a proposed settlement could lead to consumer harm. The FTC objected to the proposed settlement in *Chavez v. Netflix, Inc.* on this very ground, because the proposed relief was a "free one-month upgrade" combined with a "negative option plan" that meant that "new or upgraded service will continue automatically, and the member will be billed accordingly, unless he or she takes steps to cancel or modify the subscription." FTC's Mem. of Law as *Amicus Curiae* 2, No. CGC-04-0434884 (Cal. Super. Ct. Jan. 5, 2006), *available at* http://www.ftc.gov/os/2006/01/netflixamicusbrief.pdf. As the FTC explained, the negative option was "more of a promotional vehicle for Netflix than compensation for consumers." *Id.* at 10. In at least one other case, the settling parties relied upon the inattention of the district court to perform a bait-and-switch and provide class members substantially less relief than what was promised in the settlement notice; the class counsel, notwithstanding its fiduciary duty to the class, hired an expert to argue against the more favorable interpretation of the settlement proposed by class members who complained about the surprise. Ronald Barusch, *Dealpolitik: The Good, the Bad and the Ugly of Class Actions*, Wall St. J. (Mar. 24, 2011), *available at* http://blogs.wsj.com/deals/2011/03/24/dealpolitik-the-good-the-bad-and-the-ugly-of-class-actions; Ted Frank, *Court rules for NVIDIA*, Point of Law (May 2, 2011, 2:28 PM), http://www.pointoflaw.com/archives/2010/12/trial-lawyers-a-3.php.

[48] For more on this, *see* Lester Brickman, *Lawyer Barons* 349-56 (2011).

[49] *See, e.g.*, Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 459 (Rand Institute for Civil Justice 2000); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 747 (1988) (class action "claims procedures are ill-suited" to ensuring class members obtain compensation); *Sullivan v. DB Investments*, 667 F.3d 273, 329 n. 60 (3d Cir. 2011) (en banc) ("consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns"); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) (2676 out of 10 million class members made claims); *Palamara v. Kings Family Rests.*, No. 07-317, 2008 WL 1818453, at *1-*3 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement); Declaration of Dan Rosenthal ¶ 12, *NVIDIA GPU Lit.*, No. 5:08-cv-4312-JW, Dkt.

No. 357 (founder of class action settlement claims administrator testifies that claims rates are typically 0.5% to 1.5%). In the *In re Classmates.com* settlement, class counsel fought long and hard to defend a claims process that would have resulted in less than $60,000 in cash to the class; after two successful objections, the settlement fund eventually was increased to $3.5 million, though that still resulted in just a token payment to hundreds of thousands of class members, and zero to millions more. 2012 U.S. Dist. LEXIS 83480 (W.D. Wash. Jun. 15, 2012).

[50] *Laster*, 584 F.3d at 856.

[51] Omri Ben-Shahar, Arbitration and Access to Justice: Economic Aanalysis, University of Chicago Institute for Law & Economics Olin Research Paper No. 628 (2013).

[52] Too, it is my experience that class action settlements involving classes from lower-income demographics are more likely to be structured to provide illusory relief to class members that are less likely to object.

[53] *E.g.*, *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

[54] *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1347-48 (1995); Coffee, *supra* note 46, at 883-84; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7-8 (1991).

[55] In a now-classic study, Andrew Rosenfeld demonstrated that a class attorney that settles a class action enjoys a "settlement premium" above the average attorney's fee awarded in a class action that proceeds to judgment. *See An Empirical Test of Class-Action Settlement*, 5 J. Legal Stud. 113, 115-17 (1976). This premium is consistent with the hypothesis developed above, viz., that class attorneys will maximize their fees at the expense of the class members' compensation. *See also, e.g.*, Coffee, *supra* note 46, at 883-84.

[56] CAFA, Pub. L. No. 109-2, § 2, 119 Stat. 4.

[57] *See id.* at 4; *see also* S. Rep. No. 109-4, at 33.

[58] R. Ted Cruz, Dir. Office of Policy Planning, FTC, Friend of the Court: The Federal Trade Commission's Amicus Program, Remarks Before the Antitrust Section of the American Bar Association 13 (Dec. 12, 2002), *available at* http://ftc.gov.speeches/other/tcamicus; Deborah Platt Majoras, Chairwoman, FTC, *Comments at the FTC Workshop: Protecting Consumer Interests in Class Actions* (Sept. 13, 2004), *in* 18 Geo. J. Legal Ethics 1161, 1162-63 (2005) (class actions may not "truly serve consumers' interests by providing them appropriate benefits"; encouraging "consumers to carefully scrutinize opt-out notices and class action settlement terms and particularly attorney fee awards that may reduce the total compensation available to consumers").

[59] *See* Cruz, *supra* note 58, at 13 ("Not infrequently, the interests of a private class action attorney may substantially diverge from the interests of the class.").

[60] *See generally* Fed. R. Civ. P. 23(e).

[61] *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).

[62] *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987).
In recent years, an interesting claim has arisen that this problem is solved by simply negotiating the attorney fee sequentially to the class relief, sometimes in a separate fund. This is fiction. "Anyone familiar with the most rudimentary principles of economics knows that that sounds better than it is because the money always comes out of the class, whether directly or indirectly." Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L. Rev. 439, 504 (1996). The fact that fees may not be negotiated until after the rest of the settlement is resolved makes no economic difference. Settling parties are rational economic actors. Even when the negotiations over fees are severed, the parties know in advance that those negotiations are coming, that the defendants have a reservation price based on their internal valuation of the litigation, and that every dollar negotiated for the class reduces the amount the defendants are willing to pay class counsel. The defendants can further reasonably estimate in advance what plaintiffs will claim their lodestar

to be from their own defense costs. Because these future fee negotiations are not an unexpected surprise, and because the parties know a settlement will not occur unless the parties agree to an attorney-fee clause, the overhang of the future fee negotiations necessarily infects the earlier settlement negotiations. "Even if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations." *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 266 (1985); *cf. also Bluetooth*, 654 F.3d at 948 (neither presence of neutral mediator nor separation of fee negotiations from other settlement negotiations demonstrates that a settlement is fair). "In other words, the negotiation of class counsel's attorneys' fees is not exempt from the truism that there is no such thing as a free lunch." *Staton*, 327 F.3d at 964. See also Brickman, *supra* note 48, at 522-25.

[63] S. Rep. No. 109-2, at 14, 33; *see also* John H. Beisner, Matthew Shors, & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1447-50 (2005) (presenting list of "abusive" class settlements).

[64] *See* Hensler, Class Action Dilemmas, at 14 (profiling case studies), 23 (presenting comparison of attorneys' fees with total cash payments).

[65] *Id.* at 427 (emphasis added).

[66] *See* Fitzpatrick, *supra* note 34.

[67] *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Penn. L. Rev. 1593, 1606 (2008); Coffee, *supra* note 54, at 1370 (defining "reverse auction").

[68] *See* Fitzpatrick, *supra* note 34.

[69] *See* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemp. Probs. 97, 108 (1997); Brickman, *supra* note 48, at 346-49.

[70] *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007); *see also In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001).

[71] *In re Mex. Money Transfer Litig.*, 267 F.3d at 748.

[72] *See, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 n.58 (D. Me. 2003).

[73] *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991, 995 (2002).

[74] *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 572, 574 (N.C. App. 2008) (317 valid claims filed out of 1,500,000 member class, for total of $2,402 in total redemption of coupons as compared to more than $1,000,000 in attorneys' fees and costs); *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So.2d 186, 188 (Ala. 2000) (113 redemptions out of 104,000 member class); Jeff Feeley & Myron Levin, *Ford Accord Garners Less Than 1 Percent Participation*, Bloomberg (July 7, 2009) (75 coupons redeemed out of class of 1 million, while class attorneys received $25 million in fees and costs); Daniel Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com On the Docket (June 23, 2010), *at* http://blogs.forbes.com/docket/2010/06/23/st-louis-judge-hands-lawyers-21-million-for-coupons/ (Missouri class action settlement of $21 million for lawyers compared to $5 million in cash and $34 million in coupons for class).

[75] *See* CAFA, Pub. L. No. 109-2, §§ 2-3, 119 Stat. 4.

[76] *See Radosti v. Envision EMI, LLC*, No. 09-887, 2010 WL 2292343 (D.D.C. June 8, 2010).

[77] *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260 (E.D. Mo. May 31, 2011) (*motion for rehearing and/or transfer to Supreme Court denied*).

[78] *Blessing v. Sirius XM, Inc.*, No. 11-3696 (2d Cir. Dec. 20, 2012) (summary order) (petition for rehearing pending); *In re Online DVD Rental Antitrust Lit.*, No. 4:09-md-2029 (N.D. Cal. 2012) (appeal pending).

[79] *Cf.* Erichson, *supra* note 67, at 1607 ("CAFA's Whac-a-Mole effect manifests itself in several ways.").
[80] Redish, *supra* note 37, at 625.
[81] *See id.* at 618-19; Theodore H. Frank, Cy Pres *Settlements*, Class Action Watch (Mar. 2008), at 1.
[82] Redish, *supra* note 37, at 625.
[83] Frank, *supra* note 81; *see also, e.g.*, Coffee, *supra* note 54, at 1368 (discussing *cy pres* settlement In *re Matzo Food Prods. Litig.*, 156 F.R.D. 600 (D.N.J. 1994), which seemed a clever "way of" allowing the defendant food producer "simultaneously" to "dispos[e] of both stale matzos and a difficult litigation").
[84] Frank, *supra* note 81, at 21.
[85] For example, Kellogg agreed to class action settlements that required it to donate a few million dollars of products to food-banks—something it was already doing to the tune of tens of millions of dollars a year. *Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012) (rejecting settlement). Similarly, in the class action settlement in *In re Bayer Corp. Combination Aspirin Products Marketing and Sales Practices Litigation*, No. 09-md-2023 (E.D.N.Y.), where I have an objection pending, the *cy pres* is targeted for the American Heart Association, which not only already regularly receives money from Bayer, but endorses Bayer's aspirin to the exclusion of other brands of aspirin.
[86] *Compare Dennis v. Kellogg*, 697 F.3d 858 (9th Cir. 2012); Nachshin v. AOL LLC, 663 F.3d 1034 (9th Cir. 2011); *and Klier v. Elf Atochem N. Am.*, Inc., 658 F.3d 468 (5th Cir. 2011); *with Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012). In *Lane*, the *cy pres* went to a new charity established by defendant Facebook, who could then direct the money to recipients favorable to Facebook's lobbying interests. Roger Parloff, *Google and Facebook's new tactic in the tech wars*, CNN Money (Jul. 30, 2012 12:18 PM), http://tech.fortune.cnn.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/.
[87] *Bayer* is not unique. In the pending Third Circuit case of In *re Baby Products Antitrust Litigation*, No. 12-1165 (3d Cir.), the class will receive less than $3 million of a $35 million settlement fund, while the attorneys were awarded $14 million.
[88] *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1076-77 (S.D. Tex. 2012).
[89] *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012).
[90] 654 F.3d 935 (9th Cir. 2011). On remand, plaintiffs unsuccessfully asserted that the injunctive relief—trivial warnings of the open and obvious danger of hearing loss from listening to conversations at loud volume for long periods of time—was worth nearly a billion dollars, and the district court reduced the request substantially. In the absence of a public-interest objector willing to take the matter on appeal, the settlement and excessive fee would have been rubber-stamped without incident.
[91] Brickman, *supra* note 48, at 348 & n.58.
[92] Ted Frank, *Food lawsuits*, Point of Law (Aug. 23, 2012, 9:00 AM), http://www.pointoflaw.com/archives/2012/08/food-lawsuits.php. *Contrast In re Nutella Mktg. and Sales Pract. Lit.*, No. 3:11-cv-1086 (D.N.J.) *with In re Ferrero Lit.*, No. 11-CV-205 (S.D. Cal.). Appeals are pending in both cases.
[93] *True*, 749 F. Supp. 2d at 1077; *Synfuel*, 463 F.3d at 654.
[94] *Cf.* Larry David, *Seinfeld: The Non-Fat Yogurt* (NBC Nov. 4, 1993).
[95] Expect the recent class actions brought against Subway over whether their foot-long sandwiches are actually a foot long to settle in such a manner.
[96] 150 F.3d 1011 (9th Cir. 1998).
[97] *Blessing v. Sirius XM, Inc.*, Inc., No. 09 CV 10035HB (S.D.N.Y. Aug. 24, 2011), *aff'd*, No. 11–3696–CV (2d. Cir. Dec. 20, 2012).
[98] *True v. Am. Honda Co.*, 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010); *Synfuel Tech v. DHL Express*, 463 F.3d 646, 654 (7th Cir. 2006).
[99] S. Rep. No. 109-14, at 14 (citing *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996)).

[100] *See* Fed. R. Civ. P. 23(e).

[101] *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 699 (1994); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. Rev. 1435, 1445 (2006).

[102] *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).

[103] *Staton*, 327 F.3d at 964 (*quoting In re Gen. Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Bluetooth*, 654 F.3d at 949; *Mirfasihi*, 356 F.3d at 785.

[104] Brickman, *supra* note 48, at 356-60.

[105] Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 571 (2008) (reviewing empirical studies).

[106] Searle Civil Justice Center, Consumer Arbitration Before the American Arbitration Assoication: Executive Summary (Mar. 2009), at http://www.searle arbitration.org/report/exec_summary.php.

[107] *Cf.*, *e.g.*, *Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002).

[108] Rutledge, *supra* note 105, at 560 (survey of empirical literature).

[109] *See* American Arbitration Association, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, *available at* http://www.adr.org/si.asp?id=5027.

[110] Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36 (2006).

[111] *E.g.*, *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010), *rev'd on other grounds*, 131 S.Ct. 3060 (2011).

[112] Harris Iinteractive, Arbitration: Simpler, Cheaper, and Faster Than Litigation (U.S. Chamber Inst. for Legal Reform 2012), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf; *see also* Rutledge, *supra* note 105, at 561.

[113] *Id.*

[114] *See* Section on Litigation Task Force on ADR Effectiveness, Survey On Arbitration Q9, Q13 (Aug. 2003), *available at* http://www.abanet.org/litigation/taskforce/adr/surveyreport.pdf; *see also* Rutledge, *supra* note 105, at 561.

[115] Cole & Frank, *supra* note 12, at 31 & n.5.

[116] *Id.* at 32.

[117] *See, e.g.*, Tor Wallin Andreassen, *What Drives Customer Loyalty with Complaint Resolution?*, 1 J. of Serv. Research 324, 329 (1999).

[118] *See, e.g.*, Eugene W. Anderson, *Customer Satisfaction and Word of Mouth*, 1 J. of Serv. Research 5, 6, 15 (1998).

[119] Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, 68 Harv. Bus. Rev. 105, 107 (1990).

Customer loyalty is a particularly strong predictor of firm success. Because existing customers bring increased business at lower costs, customer retention rates have a dramatic impact on a firm's bottom line. *Id.* at 105 (finding that businesses retaining 5% more customers see 100% increase in profit).

[120] *See, e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Dispute Resolution 89, 91 (2001); Rutledge, *supra* note 105, at 579-81.

[121] *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991).

[122] *See, e.g.*, *Metro E. Ctr. For Conditioning & Health v. Quest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002).

[123] *IFC Credit Corp. v. United Business & Indus. Federal Credit Union*, 512 F.3d 989 (7th Cir. 2008).

[124] Brian Fitzpatrick, *Did the Supreme Court Just Kill the Class Action?*, Class Action Watch (Sep. 2011).

[125] Public Citizen & Nat'l Ass'n of Consumer Advocates, *Justice Denied: One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* 32-34 (April 2012), *available at* http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf.

[126] 532 U.S. 105, 123 (2001).

[127] Moreover, the National Labor Relations Board has decided, for the first time in its history, that mandatory arbitration agreements are an unfair labor practice in some circumstances. *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (Jan. 3, 2012). The ultimate effect of this decision will be to reduce wages and increase unemployment, with a wealth transfer to attorneys at the expense of employees. *Cf.* Testimony of Theodore H. Frank to Senate Republican Conference 4-5 (Mar. 16, 2009).

[128] 583 F.3d 228 (5th Cir. 2009).

[129] *Hot Coffee* (HBO 2011). The U.S. Chamber Institute for Legal Reform has a useful website debunking many of the incorrect claims in the film, http://hotcoffeetruth.com.

[130] For more on the *Jones* case, *see* Ted Frank, *Jamie Leigh Jones lawsuit falling apart*, Point of Law (Jul. 7, 2011, 11:57 AM), http://www.pointoflaw.com/archives/2011/07/jamie-leigh-jon.php, and blog posts and articles cited therein; Mike Tolson, *Jones coverage not a high point for news media*, Houston Chronicle (Oct. 3, 2011).

[131] *Compare Owen v. Bristol Care, Inc.*, No. 12-1719, 2013 WL 57874 (8th Cir. Jan. 7, 2013) *with In re D. R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (N.L.R.B. Jan 03, 2012), appeal pending.

[132] Ted Frank, *The Carlyle IPO*, Point of Law (Feb. 6, 2012 8:33 AM), http://www.pointoflaw.com/archives/008941.php; Miles Weiss et al., *Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts*, Bloomberg (Feb 3, 2012 5:57 PM), http://www.bloomberg.com/news/2012-02-03/carlyle-drops-class-action-lawsuit-ban.html.

[133] *See, e.g.*, *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Felzen v. Andreas*, 134 F.3d 873, 876 (7th Cir. 1998) (citing academic literature). *See also* Brickman, *supra* note 48, at *373 ff*.

[134] James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 Manh. Inst. Civ. J. Rpt. 1 (2012).

[135] Dyck, Alexander, Adair Morse, and Luigi Zingales. *Who Blows the Whistle on Corporate Fraud?* The Journal of Finance 65, 6 (2010): 2213-2253 (less than 2% of fraud uncovered by private securities litigation).

[136] Committee on Capital Markets Regulation, http://www.aei.org/files/2008/02/14/20080215_ScottPresentation.pdf.

[137] Again, the result of the litigation burden is a wealth-transfer upwards: middle-class investors do not have access to the benefits of Rule 144A private placements as a matter of regulation, while wealthy investors do. Securities litigation settlements usually also result in wealth-transfers upwards; aside from the millions going from the average investor to wealthy attorneys, securities settlement claims processes almost invariably benefit institutional investors at the expense of individual investors. Cf. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 Vand. L. Rev. 1109 (2011).

[138] *E.g.*, *Chavarria v. Ralphs*, 812 F. Supp. 2d 1079 (C.D. Cal. 2011); *Urbino v. Orkin Services of California Inc.* No. 2:11-cv-06456-CJC(PJWx) 2011 U.S. Dist. LEXIS 114746 (C.D.Cal. Oct. 5, 2011); *Reyes v. Macy's, Inc.*, 202 Cal. App.4th 1119 (2012); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011).

[139] *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

[140] In re American Express Merchants' Litigation, 681 F.3d 139, 142-49 (2d Cir. 2012) (Jacobs, J., dissenting from denial of rehearing *en banc*).

[141] *Id.*

[142] Robert Bork, The Antitrust Paradox 372-81; Richard Posner, Antitrust Law: An Economic Perspective 198-202 (2d ed. 2011); George J. Stigler, *United States v. Loew's Inc.: A Note on Block Booking*, 1963 Sup. Ct. Rev. 152.

[143] The brief for respondents, signed by Paul Clement, cleverly asks only for a narrow holding based on that artificial record.

[144] In re American Express, 681 F.3d at142-49 (2d Cir. 2012).

[145] David Nicklaus, *Class-action lawyers swarm around buyout deals*, St. Louis Post-Dispatch (Feb. 7, 2012).

The Manhattan Institute's **Center for Legal Policy (CLP)** works to advance the principled, long-term reform of our nation's civil and criminal justice system by offering incisive and rigorous analysis of the system's problems as well as effective practical solutions. For over twenty-five years, CLP has provided the intellectual underpinnings for various reform efforts.

CLP's web magazine, PointofLaw.com, brings together information and opinion on the U.S. litigation system from leading academics and practitioners, and features an archive of books and downloadable articles essential for an understanding of the debate over legal reform. ProxyMonitor.org sheds light on the influence of outside shareholder proposals on publicly traded corporations by tracking proposals in real time as the Fortune 200 companies hold their annual meetings. CLP also produces *Trial Lawyers, Inc.*, a series of reports that shed light on the size, scope, and inner workings of the litigation industry.

www.Manhattan-Institute.org/html/clp.htm
www.PointofLaw.com
www.TrialLawyersInc.com
www.ProxyMonitor.org

The Manhattan Institute is a 501(C)(3) nonprofit organization. Contributions are tax-deductible to the fullest extent of the law. EIN #13-2912529